no way affects that of the corporation. They are two separate and distinct persons and the fact that an officer of a foreign corporation is resident within the state does not give the corporation a domicil therein.[23]

> "A court of one state cannot, without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another state where such corporation has not come into the state for the purpose of doing business therein, or has no agent there upon whom process may be served; and the mere fact that an officer is temporarily within the state or even resides there, affords no ground for taking jurisdiction over the corporation or escaping the denial of due process under the Fourteenth Amendment. Although a constructive service may be good in the courts of the same government, it cannot be recognized as valid by the courts of another." [24]

THE THEORY OF THE LEGAL ENTITY OF CORPORATIONS AS AFFECTED BY WAR.—In time of war it becomes illegal, if not under the broad rules of international law, then by the provision of statutes or proclamations of the belligerents, for parties who are alien enemies to enter into any contractual or commercial relations with each other, or for a citizen of one country to confer benefits in any manner upon the enemy country. This mandate of the government in certain cases brings before the courts the question of whether or not the awarding of a judgment in favor of an alien enemy plaintiff confers a benefit on the enemy country.

If the plaintiff is an alien enemy, residing in the enemy country, he will be denied the right to sue or to continue a pending suit until the cessation of hostilities.[1] And this rule applies where the suit is brought by a citizen of the forum state, residing in the enemy country, for the prohibition is not against the person suing,

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[23] Conley *v.* Mathieson Alkali Works, 190 U. S. 406; Riverside Mills *v.* Menefee, *supra;* Goldey *v.* Morning News, *supra;* Earle *v.* Chesapeake & O. R. Co., 127 Fed. 235; Zelnicker Supply Co. *v.* Mississippi, etc., Co., 103 Mo. App. 94, 77 S. W. 321; Kendall *v.* American, etc., Co., 198 U. S. 477; St. Clair *v.* Cox, *supra;* Doctor *v.* Desmond, 80 N. J. Eq. 77, 82 Atl. 522. The same rule applies to service upon a stockholder as to service on officers and agents. Middlebrooks *v.* Springfield, etc., Co., 14 Conn. 301.

[24] Conley *v.* Mathieson Alkali Works, *supra.*

[1] Bell *v.* Chapman, 10 Johns. 183; Howes, etc., Co. *v.* Chester Co., 33 Ga. 89; Hutchinson *v.* Brock, 11 Mass. 119; Plettenberg, etc., Co. *v.* Kalamon Co., 241 Fed. 605; Stumpf *v.* Scrieber Brewing Co., 242 Fed. 80. But in the recent case of Posselt *v.* D'Espard (N. J.), 100 Atl. 893, the court, basing its decision on the liberal and tolerant language of the President's Proclamation of War, allowed German citizens, resident in Germany, to maintain a suit in U. S. Courts. This case is out of line with the settled rule on principal and authority.

but against the transfer of goods to the enemy country.[2] However, where the plaintiff alien enemy is residing in the forum state and is suing to protect his private rights, he is generally allowed to recover.[3] And this is the sound rule, for to deny an alien enemy the right to enforce contracts and to protect his property, would be the grossest injustice without reason. The Court in *Clark* v. *Morey*[4] said:

> "The disability (to sue) is confined to these two cases; 1. Where the right sued for was acquired in actual hostility, * * *. 2. Where the plaintiff, being an alien enemy, was resident in the enemy's country; * * *."

When these principles are applied to domestic corporations whose members are alien enemies, resident in the enemy country, the difficult question arises, Is the corporation to be regarded as a resident citizen, or should the court look behind the corporation, and hold the plaintiff to be, in fact, an alien enemy, resident in the enemy country? The answer to this question depends upon the theory of the legal entity of corporations.

The idea of a corporate existence, separate and distinct from the members of which it is composed, was developed by the Romans. Much doubt in early times was cast on this theory both in England and in the United States, and this was due to the misconception of the decision in the early English case of *London* v. *Wood*.[5] This case held that as action could not be sustained by the Mayor of London, which was also to be tried before him. In the case of *Bank* v. *Deveaux*,[6] Chief Justice Marshall, basing his decision on *London* v. *Wood*, decided that, where a corporation is chartered under the Federal Laws, the court will look behind the corporation to the stockholders, and regard the domicile of the corporation as identical with that of the stockholders, for the purposes of jurisdiction in the Federal Courts. This case was overruled by the case of *Louisville, etc., Ry. Co.* v. *Letson*,[7] in which it was held by the Court:

> "* * * a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person."

It may be regarded as settled by this and later decisions of the

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[2] McConnell *v.* Hector, 3 Bos. & P. 113.

[3] Clark *v.* Morey, 10 Johns. (N. Y.) 69; Otteridge *v.* Thompson, Fed. Cas. 10,618. Contra, Levine *v.* Taylor, 12 Mass. 8, holding that a resident alien enemy cannot sue during war.

[4] *Supra.*

[5] 12 Mod. 669.

[6] 5 Cranch 61.

[7] 2 How. 497.

Supreme Court that for purposes of jurisdiction there is an indisputable presumption that the stockholders are all residents of the state in which the corporation is incorporated, and the court cannot look behind the corporate entity.[8] And it is also well settled that, in regard to property rights, contractual relations and choses in action in general, the corporation is the proper party plaintiff or defendant, since the shareholders have no title to, or rights in, corporate property or choses in action.[9]

But though it is the settled rule in actions at law that the court cannot go behind the corporate entity, equity is not bound by any such rule, and will disregard the theory in a proper case. The legal entity theory is a fiction of law and is justified by its usefulness in the transaction of corporate business, by the convenience of suing and being sued in the corporate name, in the continuation of the rights and liabilities of the corporation unaffected by changes in corporate members, and in allowing the limiting of the liability of the members for the corporate debts to a fixed sum. But where one attempts to perpetrate a fraud, using the corporation as a shield, equity will disregard the fiction of legal entity and hold him liable.[10] So, equity will disregard the fiction of corporate entity in a case where it is urged to an end subversive to the public policy,[11] or where it is used to create an unlawful trust.[12] And in a case where the stockholders, the real beneficiaries, have no equities in the matter, equity will not allow a recovery in the name of the corporation.[13] Nor could one, who practically owns, and in fact dominates, a corporation, protect himself from the charge of embezzlement by claiming that his act was done by the corporation.[14] And, also, where the directors refuse to sue the officers of the corporation for mis-management, equity will allow an injured stockholder to bring the suit.[15]

The answer to the question, whether the court should regard a domestic corporation, whose members are alien enemies resident in the enemy country, as a citizen of the forum state or whether it should be regarded as a non-resident, alien enemy, depends upon whether or not an exception to the theory of the legal entity of corporations is justified in this case. The only ground for such an exception, at law or in equity, is that the court would be indi-

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[8] Marshall *v.* Baltimore & O. R. R. Co., 16 How. 314; St. Louis, etc., Ry. Co. *v.* James, 161 U. S. 545.

[9] Smith *v.* Hurd. 12 Metc. (Mass.) 371, 46 Am. Dec. 690.

[10] Donovan *v.* Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176; First Natl. Bank *v.* Trebein Co., 59 Ohio St. 316, 52 N. E. 834.

[11] State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541.

[12] Southern, etc., Co. *v.* State, 91 Miss. 195, 44 South. 785, 124 Am. St. Rep. 638.

[13] Home Fire Ins. Co. *v.* Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927.

[14] Milbrath *v.* State, 138 Wis. 354, 120 N. W. 252, 131 Am. St. Rep. 1012.

[15] Brinckerhoff *v.* Bostwick, 88 N. Y. 52.

rectly conferring a benefit on the alien enemy shareholders. But when it is considered that the payment of the judgment could not aid the enemy until after the termination of the war, it will be seen that this is not a benefit conferred during the war, but one which can only be enjoyed at its conclusion. Furthermore, it is not the function of the Judiciary to determine the political policy of a nation. That duty is imposed on the Legislative and Executive Departments, and the Judiciary interprets these policies as expressed by the laws enacted in pursuance of them, as applied to the facts of actual cases.

The leading case in England on this point is the recent case of *Continental Tyre & Rubber Co.* v. *Daimler.*[16] In that case the plaintiff was a corporation chartered in England and doing business there. All of the shares, except one, were owned by Germans, residing in Germany. This single share was owned by an English citizen, who was the secretary and business manager of the corporation. The directors were all German residents. After the outbreak of war the corporation brought an action against the defendant on a bill of exchange of which it was the drawer and holder. The defendants resisted the action on the ground that payment to an alien enemy was illegal. But the court held that the corporation was an English corporation and remained so in spite of the outbreak of war; that a court could not go behind the corporate entity to see who the stockholders were, since the action was in the name of the corporation; and that under the provisions of the Trading with the Enemy Act the payment was not illegal.

The House of Lords reversed the decision partly on the technical ground that the secretary had no authority to bring the action.[17]

Not only does the decision of the Court of Appeals seem eminently sound on principal, but it is also sustained by authority.[18] The money was allowed to accumulate in bank and no attempt was made to send it to Germany. The point was also raised, that if the court should disregard the fiction of legal entity in this case, it could not consistently uphold the rights of English stockholders in a corporation in which Germans held stock.

The recent case of *Fritz Schulz, Jr., Co.* v. *Raimes & Co.*,[19] in the United States, repudiates the reasoning of the House of Lords and adopts the decision of the Court of Appeals. In this case the plaintiff was a corporation chartered in New Jersey. Of the fifty shares constituting the capital stock of the corporation forty-seven shares were owned by German citizens. The other three shares were owned by two Americans and an Austrian, who had declared his

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[16] 1 K. B. 893, 5 B. R. C. 304.

[17] 2 A. C. 307, 6 B. R. C. 269.

[18] Janson *v.* Dreifontein Consolidated Mines, (1902) A. C. 484; Gramaphone & Typewriter Co. *v.* Stanley, (1908) 2 K. B. 89; Steamship Co. *v.* Tugman, 106 U. S. 118; Society *v.* Wheeler, Fed. Cas. 13, 156; Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776; Peoples Pleasure Park Co. *v.* Röhleder, 109 Va. 439, 61 S. E. 794.

[19] 166 N. Y. Supp. 567.

intention to become an American citizen. The management of the corporation was by the Austrian. The Board of Directors was composed of the two Americans, the Austrian and a German. When this action was brought the defendant made a motion to stay proceedings until the termination of the war, on the ground that the plaintiff was an alien enemy. The Court held that the corporation was an entity distinct from its members, was to all intents and purposes a citizen of New Jersey, and that no disability to sue attached to it.

This case follows the better authority, and is further justified by the fact that, at the time of the decision, no statute had been passed changing the common law rule as to the legal entity of corporations in this case. But doubtless the Trading with the Enemy Act, passed by Congress on October 6th, will affect this rule.